SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

*** FILED ***
04/09/2002

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CLERK OF THE COURT
FORM V000A

HONORABLE MICHAEL D. JONES

P. M. Espinoza
Deputy

CV 2001-018541
Docket Code 019

FILED: _____

JON HICKMAN
v.
DANIEL COSTELLO

ANDREW M HULL

ERIC C ANDERSON

PHX JUSTICE CT-E2
REMAND DESK CV-CCC

MINUTE ENTRY

This Court has jurisdiction over this appeal pursuant to the Arizona Constitution Article VI, Section 16, and A.R.S. Section 12-124(A).

This matter has been under advisement. This Court has reviewed the judgments of record from the East Phoenix # 2 Justice Court and Appellants' memorandum; however, I note that Appellee filed no memorandum regarding this appeal. Appellants seek relief from an East Phoenix # 2 Justice Court default judgment signed July 19, 2001.[1] Appellants claim "insufficiency of service of process"[2] and denial of procedural due process.[3] This court finds those claims to have definite merit.

Appellants indicate the summons and complaint were not received. Both the personal service and the certified mail copies were delivered to Appellants' former residence after Appellants vacated the premises[4] pursuant to Appellee's eviction notice.[5] These assertions by Appellants are uncontroverted.

The standard of review for the granting or denial of a motion under Arizona Rules of Civil Procedure Rule 60, Relief from Judgment or Order, is abuse of discretion,[6] so this court must review accordingly.[7] However, at the same time, the appellate court must

[1] Judgment Order July 19, 2001.
[2] Appellant memo, p. 4, l. 9.
[3] Appellant memo, p. 4, ll. 15-19.
[4] Appellant memo, p. 3, l. 22 through p. 4, l. 5.
[5] Appellant memo, p. 3, ll. 11-12 and Appendix B.
[6] Occidental Life Ins. Co. v. Marsh, 5 Ariz.App. 74, 76, 423 P.2d 150, 152 (Ariz.App. 1967).
[7] State v. Rogers, 186 Ariz. 508, 510, 924 P.2d 1027, 1029 (1996).

defer to the trial court's factual findings that form the basis for its legal rulings, including findings regarding witness credibility.[8] Only when a trial court's factual finding, or inference drawn from that finding, is not justified or is clearly against reason and the evidence, will an abuse of discretion be established.[9]

Unfortunately, the trial court's record provides scant narrative, no findings of fact, and no reason why Appellant's request for relief was denied.[10] Therefore, in harmony with the rule articulated in Eldridge v. Jagger,[11] I believe the Appellants have met their burden of impeaching " . . . the return of service of process . . . by clear and convincing evidence . . . "[12]

Service of process is necessary to provide a Defendant with notice of a lawsuit and entry of an adverse judgment to protect the constitutional rights of procedural due process.

"[Sufficient notice is] reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."[13] And, an absent defendant may often set aside a default judgment upon a proper showing of lack of notice when there was no intent to evade process.[14] Furthermore, the Arizona Rules of Civil Procedure provide for the setting aside of a default judgment for "any other reason justifying relief from the operation of the judgment."[15]

In Roll v. Janca,[16] employing the "any other reason" provision of Rule 60 to set aside judgment did not constitute an abuse of discretion where uncertainty existed whether defendants had actually received service of process.[17] Moreover, in keeping with Webb v. Erickson,[18] ". . . the purpose of clause 6 [in Rule 60(c)] is to enable trial courts to grant equitable relief from default whenever . . . justice requires."[19]

Appellants claim the notice of entry of judgment did not reach them until August 7, 2001.[20] By this time Appellants had been evicted from Appellee's apartment building. Moreover, consistent with their lease agreement, they had attempted to return the keys to

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[8] State v. Gonzalez-Gutierrez, 187 Ariz. 116, 118, 927 P.2d 776, 778 (1996); State v. Magner, 191 Ariz. 392, 397, 956 P.2d 519, 524 (1998).
[9] State v. Chapple, 135 Ariz. 281, 297, 660 P.2d 1208, 1224 (1983); State v. Magner, *supra*.
[10] RT, 1 of 1.
[11] Eldridge v. Jagger, 83 Ariz. 150, 317 P.2d 942 (1957).
[12] Eldridge v. Jagger, 83 Ariz. at 152, 317 P.2d at 943; Tonelson v. Haines, 2 Ariz.App. 127, 406 P.2d 845 (Ariz.App. 1965).
[13] Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314, 70 S.Ct. 652, 657, 94 L.Ed. 865, 873 (1950).
[14] Walker v. Dallas, 146 Ariz. 440, 445, 706 P.2d 1207, 1212 (1985).
[15] A.R.S. Ann. R. Civ. Proc. 60(c)(6).
[16] Roll v. Janca, 22 Ariz. App. 335, 527 P.2d 294 (App.Div.1 1974).
[17] Id., 22 Ariz. App. at 338, 527 P.2d at 297.
[18] Webb v. Erickson, 134 Ariz. 182, 655 P.2d 6 (1982).
[19] Id., 134 Ariz. at 186, 655 P.2d at 10 (referring to A.R.S. Ann. R. Civ. Proc. 60(c)(6)).
[20] Appellant memo, p. 4, ll. 7-8.

Appellee at the address he provided.[21] Had Appellee furnished Appellants a valid forwarding address, efforts to return the apartment keys to Appellee might have reestablished contact and updated the parties' addresses. Very likely, the service of July 13, 2001 failed to apprise Appellants of the pendency of the action and afford them the opportunity to present their objections. As the record indicates, neither party had a valid forwarding address for the other.

Appellee evidently did not actually serve Appellants' current residence; therefore, Appellee probably failed to observe A.R.S. 33-1377, which states in part: The tenant is deemed to have received the summons three days after the summons is mailed if personal service is attempted and within one day of issuance of the summons a copy of the summons is conspicuously posted on the *main entrance of the tenant's residence* and on the same day the summons is sent by certified mail, return receipt requested, to the tenant's last known address. The summons in a special detainer action *shall be served at least two days before the return day* and the return day made on the day assigned for trial. Service of process in this manner shall be deemed the equivalent of having served the tenant in person for the purposes of awarding a money judgment for all rent, damages, costs and attorney fees due. . . .[22]

While Appellee would meet the requirement of providing a "summons . . . by certified mail, return receipt requested, to *the tenant's last known address*", he failed to satisfy the requirement of "[conspicuously posting] a copy of the summons . . . on the *main entrance of the* ***tenant's residence*** . . . ." By the time the Appellee attempted to serve the Appellants with the summons, the vacated apartment was no longer the Appellants' residence.

I conclude that the service provided Appellants was clearly deficient. Additionally, fundamental justice indicates it was clear error to deny setting aside the entry of default judgment after Appellants made their unchallenged claim to the trial court of inadequate service.

IT IS THEREFORE ORDERED reversing the East Phoenix # 2 Justice Court's denial of Appellants' request to set aside default judgment.

IT IS FURTHER ORDERED vacating the default judgment in its entirety.

IT IS FURTHER ORDERED remanding this matter to the East Phoenix # 2 Justice Court with instructions to require proper service on Appellants, and all further proceedings, including a trial in a manner not inconsistent with this opinion.

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[21] This court notes that neither the lease agreement nor the eviction notice prescribed (a) the parties' duties on eviction relative to surrender of the premises, (b) the return of keys, or (c) furnishing a valid address to the other for any potential service of process.

[22] A.R.S. 33-1377 (2001)(emphasis added).